(3)

Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-202

In the Supreme Court of the United States

OCTOBER TERM, 1993

KURAHARA & MORRISSEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J. T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
LAWRENCE H. RICHMOND
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

16 pp

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction, pursuant to the settlement agreement in this case, to order the defendant's attorneys, after the agreement had been executed and unadjudicated claims had been dismissed, to repay excessive fees received during the litigation from assets frozen by the court.

2. Whether the district court's finding that the attorneys' fees received from assets frozen by the court were unreasonable was clearly erroneous.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989)	6
Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990)	8, 9
FSLIC v. *Ferm*:	
881 F.2d 1083 (9th Cir. 1989)	2
909 F.2d 372 (9th Cir. 1990)	3, 5
FSLIC v. *Molinaro*:	
889 F.2d 899 (9th Cir. 1989)	2
901 F.2d 1490 (9th Cir. 1990)	2
923 F.2d 736 (9th Cir. 1991)	3
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911)	7
Johnson Chemical Co. v. *Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987)	9
Jones v. *Illinois Dep't of Rehabilitation Services*, 689 F.2d 724 (7th Cir. 1982)	9
Kurkowski v. *Volcker*, 819 F.2d 201 (8th Cir. 1987)	9
League of Women Voters v. *FCC*, 751 F.2d 986 (9th Cir. 1985)	9
National R.R. Passenger Corp. v. *IAMAW*, 915 F.2d 43 (1st Cir. 1990)	8
Rothenberg v. *Security Management Co.*, 677 F.2d 64 (11th Cir. 1982)	9

Cases—Continued:

	Page
Santiago v. *Victim Services Agency of Metro. Assistance Corp.*, 753 F.2d 219 (2d Cir. 1985)	7, 8
Scam Instrument Corp. v. *Control Data Corp.*, 458 F.2d 885 (7th Cir. 1972)	7
Smith v. *Phillips*, 881 F.2d 902 (10th Cir. 1989)	8
Szabo Food Service, Inc. v. *Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987)	9
Thomas v. *Capital Security Services, Inc.*, 812 F.2d 984 (5th Cir. 1987)	9
United States v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 849 (1989)	6
United States v. *Monsanto*, 491 U.S. 600 (1989)	5
Williams v. *Ezell*, 531 F.2d 1261 (5th Cir. 1976)	7

Rules:

Fed. R. Civ. P. 41(a)(1):	
Rule 11	8, 9
Rule 41(a)(1)	7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-202

KURAHARA & MORRISSEY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is unpublished, but the decision is noted at 985 F.2d 572 (Table). The memorandum and order of the district court (Pet. App. 24-48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1993. A petition for rehearing was denied on April 21, 1993. Pet. App. 56-57. The petition for a writ of certiorari was filed on July 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Savings & Loan Insurance Corporation (FSLIC), and its successor, the Federal Deposit Insurance Corporation (FDIC), alleged that John Molinaro looted a now defunct savings and loan association, and engaged in fraudulent transfers to conceal his assets.[1] Kimberleigh Ferm, Molinaro's former wife, was one of the alleged fraudulent transferees. Pet. App. 2-3, 25.

The district court entered a preliminary injunction freezing Ferm's assets. Ferm later agreed to modify the injunction to allow her to obtain a monthly living allowance and to pay her attorneys—Kurahara & Morrissey, petitioner in this case—"reasonable" fees and costs from the frozen funds.[2] Pet. App. 26-27.

In the five months immediately following the modified injunction, Ferm paid petitioner some $400,000 from the frozen funds. Suspecting that the payments were unjustified,[3] FSLIC sought an order requiring petitioner to account for the fees. Pet. App. 27. Petitioner argued that justifying its fees would undermine the attorney-client relationship, and that the district court accordingly could not require any accounting until after the

---

[1] Molinaro's conduct is summarized in *FSLIC* v. *Molinaro*, 889 F.2d 899 (9th Cir. 1989), and *FSLIC* v. *Molinaro*, 901 F.2d 1490 (9th Cir. 1990). Molinaro was also convicted of over two dozen counts of bank fraud.

[2] The Ninth Circuit affirmed the injunction in *FSLIC* v. *Ferm*, 881 F.2d 1083 (9th Cir. 1989) (Table).

[3] The questionable expenditures included fees and expenses in connection with a trip by counsel to the Cayman Islands with the client to repatriate the concealed funds, attending depositions irrelevant to the claims made against petitioner's clients, and performing hundreds of hours of unexplained "research," "document review," and "deposition preparation." In addition, there were thousands of dollars in unexplained payments to "Cash." Pet. App. 41-48.

action against Ferm ended. *Id.* at 5-6. The district court denied FSLIC's motion without prejudice to refiling at the conclusion of the action. *Id.* at 6.

Petitioner received additional sums in the four months following the district court's ruling, and FSLIC moved the district court to review petitioner's billings. Pet. App. 28. Petitioner again argued that the district court should not review the reasonableness of its fees until after judgment was entered against Ferm.[4] This time, the district court granted FSLIC's motion and ordered petitioner to submit its fee statements for *in camera* review.[5] *Ibid.*

2. Subsequently, the FDIC entered into a settlement with Ferm pursuant to which Ferm agreed to transfer virtually all of her assets to FDIC, including all of the frozen funds. Ferm also agreed to a judgment against her in connection with certain of the fraudulent transfer claims, and FDIC agreed to dismiss with prejudice its remaining claims against Ferm. Pet. App. 58-86. The settlement agreement expressly contemplated that the FDIC would file a postjudgment fee motion against petitioner,[6] and preserved the district court's jurisdiction to enforce the settlement. *Id.* at 66-67, 75-76. Pursuant to

---

[4] Petitioner also filed a counterclaim alleging that FSLIC, Molinaro, and the district court clerk conspired to deprive Ferm of some of the funds she had concealed overseas. The district court dismissed that counterclaim with prejudice and sanctioned petitioner for filing it. In a split decision, the Ninth Circuit reversed the sanctions. *FSLIC* v. *Molinaro*, 923 F.2d 736 (9th Cir. 1991).

[5] The Ninth Circuit affirmed that order in *FSLIC* v. *Ferm*, 909 F.2d 372 (9th Cir. 1990).

[6] Paragraph 2(d) of the Settlement Agreement stated that Ferm agreed "to cooperate with FDIC in any motion for accounting and/or motion for repayment of attorneys' fees paid from [the frozen funds]." Pet. App. 66.

the settlement, the district court entered a Stipulation and Order of Dismissal of all unadjudicated claims contained in the FDIC's complaint against Ferm. Pet. App. 20-23.

3. FDIC then filed a motion to recover unreasonable fees. Pet. App. 87-90. After seeking a two-month extension of time to file a response (see *id.* at 53-54), petitioner submitted explanations of some of its fees (see *id.* at 54) and argued that the settlement had deprived the district court of jurisdiction over the FDIC's motion. The district court rejected that argument, holding that courts generally retain jurisdiction to rule on attorney fee motions after final judgment, and that courts have continuing jurisdiction to require attorneys who received funds in violation of a preliminary injunction to return those funds even if the court lacks jurisdiction over the remainder of the action. *Id.* at 49-50. The district court ordered petitioner to pay the FDIC $398,011.97 in excessive fees and costs. *Id.* at 46-48.

4. Petitioner appealed, contending that the district court lacked jurisdiction and had wrongly assigned petitioner the burden of justifying the fees. The court of appeals affirmed, holding that the settlement agreement "explicitly contemplated a motion for repayment of attorney's fees," Pet. App. 5, and that, especially in light of petitioner's repeated arguments that any determination with respect to its fees must await conclusion of the case, "[petitioner], FDIC, and the court understood any motion for repayment of fees would be brought at the end of proceedings, after judgment had been entered." *Id.* at 6. The court of appeals declined to decide who bore the burden of proving the fees reasonable, finding that the district court's decision was sustainable regardless of how that burden was assigned. *Id.* at 6-7.

ARGUMENT

The court of appeals properly construed the settlement agreement not to release petitioner from a claim that it had received excessive fees. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 24-26, 29-30) that this case raises questions of exceptional public importance because judicial review of fees paid out of frozen funds improperly allows one party to "second-guess" its adversary's litigation strategies. There is no basis for that contention. The funds at issue in this case were frozen during the litigation because their ownership was in dispute. All disbursements from those funds were subject to review by the district court to ensure that the terms of the freeze order were obeyed and the funds preserved for the benefit of the FDIC, should it prevail. The fact that the funds at issue here were improperly paid to an attorney—as opposed to a doctor, a stockbroker, or a plumbing contractor—is of no legal significance. Indeed, the district court took great care to protect the attorney-client relationship and the adversary process in this case by adopting petitioner's own suggestion that review of the propriety of the disbursements to petitioner should be postponed until the termination of the litigation on the merits.

As the court of appeals noted in an earlier opinion in this proceeding, appellate courts have consistently permitted district courts to review and limit the amount payable to attorneys from frozen assets. *FSLIC* v. *Ferm*, 909 F.2d 372, 373 (9th Cir. 1990), citing *United States* v. *Monsanto*, 491 U.S. 600, 616 (1989) ("a pretrial restraining order [freezing assets and prohibiting their use by attorneys] does not 'arbitrarily' interfere with

the defendant's 'fair opportunity' to retain counsel").[7] Accordingly, all that is at issue here is whether, on the particular facts of this case, the district court had jurisdiction to exercise the well-settled authority to protect frozen assets.

2. The court of appeals correctly resolved the jurisdictional issue in this case, relying principally on the settlement agreement, which expressly contemplated a postjudgment motion for attorneys' fees, required Ferm to assist the FDIC in making such a motion, and retained jurisdiction in the district court to enforce the terms of the agreement. Pet. App. 66-67, 75. The court found strong support for its interpretation of the settlement agreement in the proceedings of the case below, during which petitioner successfully opposed prejudgment fee review with the argument that any determination of the reasonableness of its fees should come after judgment was entered. Thus, the facts of this case, including both the terms of the settlement agreement and the proceedings leading up to the agreement, rebut petitioner's central premise (Pet. i, 4, 32-33, 38) that the parties intended to or did unconditionally release petitioner

---

[7] Petitioner essentially argues that limiting a civil defendant to paying only "reasonable" attorney fees from a judicially frozen fund interferes with that defendant's right to the effective assistance of counsel. See Pet. 28. But see *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989) (even a criminal "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice"). The district court's order here has far less effect on the attorney-client relationship than the actions this Court approved in *Caplin & Drysdale*, and thus is well within constitutional limits. Cf. *United States* v. *Bissell*, 866 F.2d 1343, 1351 (11th Cir.) ("the right to counsel of choice belongs solely to criminal defendants possessing legitimate, *uncontested* assets") (emphasis added), cert. denied, 493 U.S. 849 (1989).

from any obligation to return excessive fees paid out of the frozen assets. Review by this Court of the court of appeals' interpretation of the settlement agreement would be unwarranted.

3. Petitioner contends (Pet. 34-35) that the decision of the court of appeals finding that the district court had jurisdiction to determine the reasonableness of petitioner's fees conflicts with this Court's decision in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911), in which the Court held that the complete settlement of an underlying suit required dismissal of an action to enforce an injunction issued during the suit. Petitioner contends that *Gompers* controls here because the fees determination was in effect an action to enforce the district court's preliminary injunction freezing Ferm's assets. Petitioner's argument, however, ignores the court of appeals' finding that in the settlement agreement terminating the litigation, Ferm and the FDIC explicitly preserved the FDIC's right to seek repayment of unreasonable attorneys' fees and the district court's jurisdiction to grant that relief. Thus, unlike *Gompers*, in which the settlement was intended to resolve all disputes, the settlement in this case expressly left open the collateral fee issue. As petitioner effectively concedes (see Pet. 22-23), that distinction renders *Gompers* inapplicable to this case.

4. Petitioner also incorrectly contends (Pet. 34-48) that the decision of the court of appeals creates a split among the circuits. Virtually all of the decisions petitioner cites concern a plaintiff's absolute right under Federal Rule of Civil Procedure 41(a)(1) to dismiss a case and thereby terminate proceedings entirely before an answer or motion for summary judgment has been filed. See *Santiago* v. *Victim Services Agency of Metro. Assistance Corp.*, 753 F.2d 219, 221 (2d Cir. 1985); *Williams* v. *Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976);

Scam Instrument Corp. v. *Control Data Corp.*, 458 F.2d 885, 889 (7th Cir. 1972). Those cases have no application where, as here, an answer has been filed and a motion has been made for summary judgment, see, *e.g.*, *Santiago*, 753 F.2d at 223 (party seeking post-suit fees could have preserved its right to recover them by filing an answer or motion for summary judgment), and where the judgment ultimately entered in FDIC's favor explicitly contemplated further proceedings with respect to the fees.

The remaining cases petitioner cites are inapposite. *National R.R. Passenger Corp.* v. *IAMAW*, 915 F.2d 43, 48 (1st Cir. 1990), involved the res judicata effect of opinions and orders entered in a suit that had later been voluntarily dismissed, and *Smith* v. *Phillips*, 881 F.2d 902 (10th Cir. 1989), involved a post-dismissal attempt to conduct substantive proceedings on the merits. Here, the post-dismissal proceedings had nothing to do with the effect of the court's orders on any later case and the proceedings concerned an entirely collateral issue—the reasonableness of the attorneys' fees—that had no bearing on the substantive issues in the case.

Contrary to petitioner's suggestion, the decision of the court of appeals is entirely consistent with the body of law addressing the postjudgment jurisdiction of district courts to adjudicate collateral matters. In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), this Court recently confirmed that courts can impose Rule 11 sanctions even years after a plaintiff voluntarily dismissed the action under Rule 41(a)(1) because:

> Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanctions would be appropriate. Such

> a determination may be made after the principal suit has been terminated.

496 U.S. at 396.[8] That principle applies here, and confirms the correctness of the decision of the court of appeals.[9]

---

[8] *Cooter & Gell* rejected the very argument petitioner makes here that a voluntary dismissal under Rule 41 deprives a district court of jurisdiction to evaluate attorneys' fees. This Court affirmed a Rule 11 attorneys' fee award years after the case was dismissed because the award was collateral to the merits of the action. 496 U.S. at 396.

Cooter & Gell also effectively rejected the authority petitioner principally relies upon for its "no jurisdiction" argument. The Court specifically disagreed with *Johnson Chemical Co.* v. *Home Care Products, Inc.*, 823 F.2d 28, 31 (2d Cir. 1987), noting that the Second Circuit in that case erroneously took the position petitioner takes here. 496 U.S. at 394-395. The Second Circuit's decision in *Johnson*, in turn, had relied on *Santiago* and *Williams*, see 823 F.2d at 31, whose continuing vitality is therefore in doubt.

[9] Other court of appeals decisions are in accord with the principle articulated in *Cooter & Gell*. *E.g.*, *League of Women Voters* v. *FCC*, 751 F.2d 986, 990 (9th Cir. 1985) (affirming a district court's postjudgment attorneys' fee award, despite filing of notice of appeal); *Szabo Food Service, Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987); *Kurkowski* v. *Volcker*, 819 F.2d 201, 203 (8th Cir. 1987); *Thomas* v. *Capital Security Services, Inc.*, 812 F.2d 984, 987 (5th Cir. 1987); *Jones* v. *Illinois Dep't of Rehabilitation Services*, 689 F.2d 724, 731-732 (7th Cir. 1982); *Rothenberg* v. *Security Management Co.*, 677 F.2d 64 (11th Cir. 1982).

Petitioner attempts to distinguish *League of Women Voters*, which the district court cited, by arguing that the underlying action against its client here was settled and thus that there was nothing to which the district court's fee order could be collateral. That argument is meritless because (1) there was an appeal pending when the district court entered its fee order, and (2) the attorneys' fee issue was collateral to the adjudicated and dismissed claims involving petitioner's client, just as it was in *Cooter & Gell* and the other cases cited herein.

5. Petitioner finally contends (Pet. 54-62) that the district court improperly shifted to petitioner the burden of proving its fees reasonable. The court of appeals declined to decide that issue, however, ruling instead that regardless of who bore the burden of proof, the record supported the district court's finding that some of the fees were unreasonable:

> If [petitioner] bore the burden, it failed to provide sufficient information for the district court to assess the reasonableness of its fees. If FDIC bore the burden, it presented sufficient evidence to establish prima facie that the fee requests were not properly supported. * * * [Petitioner] offered no evidence to the contrary, but simply argued FDIC had failed to meet its burden of proof. On this record, we cannot say the district court's finding that certain of [petitioner's] requests for fees were unreasonable was clearly erroneous.

Pet. App. 6-7. The finding by the court of appeals that there was sufficient factual support for the district court's decision was correct and does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ALFRED J. T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
LAWRENCE H. RICHMOND
Counsel
Federal Deposit Insurance Corporation

OCTOBER 1993